Supreme Court, U. S.
FILED
OCT 28 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-5729

MARK DAVID OLIPHANT AND DANIEL B. BELGARDE,
Petitioners,

v.

THE SUQUAMISH INDIAN TRIBE, ET AL.,
Respondents.

BRIEF OF AMICI CURIAE:

The National Congress of American Indians,
The Arapahoe Tribe of Wyoming,
The Hoopa Valley Tribe of California, and
The Confederated Salish and Kootenai Tribes of Montana.

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

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The National Congress of American Indians,
The Arapahoe Tribe of Wyoming,
The Hoopa Valley Tribe of California, and
The Confederated Salish and Kootenai Tribes of Montana.

STATEMENT OF INTEREST

The tribal entities filing this brief are the ARAPAHOE TRIBE of the Wind River Reservation, Wyoming; the HOOPA VALLEY TRIBE of California; and the CONFEDERATED SALISH AND KOOTENAI TRIBES of the Flathead Reservation, Montana. They are federally recognized Indian tribes which reside upon and govern their respective reservations. The NATIONAL CONGRESS OF AMERICAN INDIANS is a national association of some 147 Indian tribes organized to represent the interest of American Indians.

Petitioners and respondents have consented to the filing of this brief, as indicated by appropriate letters of consent filed with the Court.

QUESTION PRESENTED

Petitioner Oliphant was involved in a fight with another person on tribal land at an annual tribal celebration. When a tribal officer intervened, Oliphant struck him and was charged under the tribal code with assaulting an officer. Pet. Br. 14. Petitioner Belgarde allegedly was racing his pickup truck on the streets of the town of Suquamish for several hours, with tribal police in hot pursuit. The chase ended with Belgarde's truck colliding with a tribal police car. He was charged under the tribal code with recklessly endangering another person, and injuring public property. *Id.* at 16-17. Both petitioners are non-Indians.

In both instances, the United States District Court below found that the tribal court had jurisdiction to punish petitioners. Both cases were appealed to the Ninth Circuit, which affirmed the tribal court's jurisdiction as to Oliphant. *Oliphant* v. *Schlie*, 544 F.2d 1007 (1976).

The question is whether an Indian tribe has retained the limited sovereign jurisdiction to impose minor punishment on a white person who breaches the peace of an Indian reservation in violation of tribal ordinances.

INTRODUCTION AND BACKGROUND

We submit that the Court's answer to the question here presented will determine whether tribal communities can have effective protection from minor crimes and breaches of the peace. State and federal law enforcement authorities have little interest in prosecuting minor infractions on Indian reservations. Tribes have learned from long experience that they will not receive adequate protection from minor infractions unless they furnish it themselves.

A large number of modern Indian tribes now have law and order systems (including codes, courts, judges, police and jails) which function well and which are constantly improving. *See* pages 17-21, *infra*. To deny their jurisdiction over whites who come onto their reservations is to leave a large gap in the authority which Indians need to protect the peace of reservation communities.

We note that this case only involves tribal *criminal* jurisdiction over non-Indians. Tribal *civil* jurisdiction over non-Indians is clear, at least when coupled with a tribal interest.[1]

When white men first came to America, they treated with the Indians as independent, sovereign nations, recognizing their superior strength and numbers. Later, as the balance in numbers reversed, the Indians were confined to reservations, to free up their vast hunting grounds for the white men's farms and ranches. Yet, on those reservations, Indians remained sovereign, subject only to the power of Congress when Congress chose to exercise it.[2]

In 1887, Congress declared that Indian reservations should be broken up into individual holdings, in order that the tribesmen might learn the benefits of private property and toil for self-gain, as their white neighbors.[3] This policy, known as the allotment policy, was a failure. Instead of adopting the white man's competitive, acquisitive ways, the Indian clung to his culture, often selling his allotment and becoming landless in the bargain. The allot-

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[1] *See, e.g., United States* v. *Mazurie*, 419 U.S. 544, 557 (1975); *Williams* v. *Lee*, 358 U.S. 217 (1959); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89 (8th Cir. 1956) (tribe may tax non-Indians); *Cowan* v. *Rosebud Sioux Tribe*, 404 F. Supp. 1338 (D.S.Dak. 1975); 23 Op. Atty. Gen. 214, 218 (1900); 55 Interior Dec. 14, 19 (1934).

[2] *United States* v. *Kagama*, 118 U.S. 375, 381-82 (1886).

[3] General Allotment Act, 24 Stat. 388 (1887), 25 U.S.C. § 331 *et seq.*

ment policy, by distributing the tribal property and bringing whites onto reservations, worked to impair the capability of tribes to govern themselves—which, indeed, was the very purpose of this policy.

In 1934, Congress, advised of the appalling social condition to which tribes and reservations had sunk, and of the crippling loss of tribal lands, enacted the Indian Reorganization Act.[4] Such tribal land as still remained unallotted was forbidden to be allotted further, and the right of allottees to sell their land was restricted. Tribes were strengthened as self-governing institutions and encouraged to adopt constitutions and to form business corporations to that end. The Secretary of the Interior was authorized to acquire land for Indians.[5]

Under the Indian Reorganization Act, tribes slowly began to reacquire the strength and land base necessary for effective self-government. This in turn brought them into greater contact with neighboring white communities. The friction created by this interplay, and perhaps local jealousy over the federal protection and privileges enjoyed by Indians, led Congress to its next major policy determination. This was to terminate federal protection of tribes, and let their future development be a part of state structures and government. The new policy was declared in 1953,[6] and thereafter a handful of tribes were actually terminated.[7]

But the termination policy, like the allotment policy, was a failure, and it was quietly abandoned after a decade

[4] 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

[5] *See Morton* v. *Mancari*, 417 U.S. 535, 542-43 (1974).

[6] H. Con. Res. 108, 67 Stat. B132.

[7] Six Indian groups were terminated in 1954 (*e.g.*, Menominee, 25 U.S.C. § 891), two more in 1956, two more in 1958, and one in 1962. There have been no terminations since then, and in fact the Menominees have been restored. 87 Stat. 770 (1973).

in favor of a return to a policy of federal assistance, coupled with renewed federal encouragement of tribal development of economic and self-government resources. Dozens of programs for tribal dvelopment were instituted by the Bureau of Indian Affairs, many of which were successful.

In 1970, long after the termination policy had been informally repudiated, President Nixon delivered a major message to Congress on Indian policy, remarkable for its scope and understanding. He declared:

> "The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[8]

He stated that forced termination of the Indians' federal relationship was wrong, as was the opposite extreme, excessive dependence upon the federal government. The correct path, he said, was between these two extremes, *i.e.*, a policy of "self-determination."

In 1975 Congress enacted the Indian Self-Determination and Education Assistance Act,[9] carrying forward the policy declared by President Nixon.

Today, as a result of the process begun through the Indian Reorganization Act of 1934, and reaffirmed by President Nixon in 1970 and the Congress in 1975, many Indian reservations are effective, modern, self-governing communities, operating much like counties and municipalities—except that they are under the federal structure, rather than the state structure. Over 100 tribes now have their own law and order systems (*i.e.*, legal codes, courts, judges, police, and jails).[10] As far as criminal matters are

[8] 6 Pres. Doc. 894 (1970).

[9] 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*

[10] See description by American Indian Policy Review Commission, pages 18-19, *infra*.

concerned, Congress has provided that these systems may not impose any punishment greater than a $500 fine and six months in jail, and persons who appear before the court are guaranteed most of the rights provided to non-Indians under the U.S. Constitution.[11]

In the entire history of the relationship between white persons and Indians, there has previously been only one reported court case involving a tribe's punishment of a white person for breach of tribal law.[12] Prior to 1887 this is not surprising, because there was little intermingling of whites and Indians on reservations, except for those whites who were assimilated into the Indian communities, usually through intermarriage. Indeed, the *Kenyon* case involved such a person. *See* page 14, *infra*.

Between 1887 and 1934, many tribal governments were functioning poorly or worse, and it is not surprising that no cases arose during that period.

It seems a little surprising that no case arose during the period 1934 to 1953, when many tribal governments were revived under the Indian Reorganization Act, but perhaps this was because newly emerging tribal governments were unwilling to display the aggressiveness necessary to exercise criminal jurisdiction over members of the dominant society.

But after the termination period was over (1953-1962) and modern tribal governments, staffed by more educated and self-confident Indians, began to mature, it was inevitable that the question of criminal jurisdiction over non-Indians would arise, and finally, in the instant case, it has.

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[11] Indian Civil Rights Act of 1968, 82 Stat. 77, 25 U.S.C. § 1301 *et seq.*

[12] *Ex parte Kenyon*, 14 F. Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720).

The issue of Indian criminal jurisdiction might have arisen on, say, the Quinault Reservation in Washington State, which has an area of 190,000 acres (entirely rural), a population of about 1,100 Indians and 200 non-Indians, and a comparatively well-equipped law and order system. Or, it might have arisen on any of a number of other reservations where the population is predominantly Indian and where there are modern law and order systems. The fact that the matter of tribal jurisdiction over non-Indians has arisen on an Indian reservation where the non-Indians far outnumber Indians should not cloud the issue. The issue should not turn on which race predominates, but on whether Congress has diminished the tribe's original sovereignty by terminating or curtailing tribal criminal jurisdiction over non-Indians who breach the peace of the reservation.

We realize that this issue is not simple, nor the answer clear at first glance. However, we believe that the answer that emerges from research, reason, and appreciation of history is that Congress has not acted with the requisite affirmative action to terminate such jurisdiction.

ARGUMENT

1. Criminal Jurisdiction is a Necessary Incident to Tribal Sovereignty.

In a long line of decisions, the Court has consistently affirmed the dual principles that Indian tribes possess attributes of internal sovereignty and that they have full jurisdiction over matters essential to that sovereignty. Chief Justice Marshall, in the seminal cases of *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832), referred to Indian tribes as "domestic dependent nations" and "distinct, independent political communities." The Court in *United States* v. *Kagama*, 118 U.S. 375,

381-82 (1886) described Indians as "semi-independent," "a separate people, with power of regulating . . . internal and social relations." More recently, after tracing the evolution and modification of the Indian sovereignty doctrine since *Worcester*, the Court concluded that Indians remain a semi-independent people, vested with many attributes of sovereignty. *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 168-73 (1973). That sovereignty extends not only over tribal members but also over all tribal territory.[13]

The touchstone for residual tribual sovereignty has been the concepts of self-governance and maintenance of essential tribal relations. *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959).[14] Courts have recognized as incidents of Indian sovereignty the authority to adopt laws and establish courts for their enforcement,[15] to regulate the

[13] *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975). *See also Morton* v. *Mancari*, 417 U.S. 535, 554 (1974) ("quasi-sovereign" tribal entities); *Williams* v. *Lee*, 358 U.S. 217, 219 (1959) (basic sovereignty principles expressed in *Worcester* remain applicable). *Cf.* Indian Self-Determination and Education Assistance Act of 1975, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.*

[14] The Court recently asserted:

> "In litigation between Indians and non-Indians arising out of conduct on an Indian reservation, resolution of conflicts between the jurisdiction of state and tribal courts has depended, absent a governing Act of Congress, on 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'"

Fisher v. *District Court*, 424 U.S. 382, 386 (1976) (citing *Williams* v. *Lee*, *supra*).

Although the present case does not, strictly speaking, involve a conflict between tribe and state, its ultimate resolution will require considering to what extent tribal, state and federal courts have jurisdiction on reservations, exclusively or concurrently.

[15] *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883); *Ortiz-Barraza* v. *United States*, 512 F.2d 1176, 1179 (9th Cir. 1975) (power to create and administer criminal justice system inherent in Indian sovereignty); *Colliflower* v. *Garland*, 342 F.2d 369, 376 (9th Cir. 1965); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89, 94 (8th Cir. 1956).

domestic relations of tribal members,[16] to safeguard and develop tribal property,[17] to tax inhabitants and persons transacting business on the reservation,[18] to provide services to members on the reservation,[19] and to be immune from suit.[20] *See generally* Powers of Indian Tribes, 55 Interior Dec. 14 (1934); 25 U.S.C. § 476 (1970).

In light of these holdings on Indian sovereignty and its attributes, the initial inquiry to be made here is whether an Indian tribe's ability to enforce its criminal laws against non-Indians is fundamental to its internal self-government. We submit that criminal authority (concurrent where appropriate) over *all* individuals on the reservation, Indian and non-Indian, within the limits of course of the Indian Civil Rights Act, is a necessary attribute of tribal self-government and consistent with previous holdings on Indian criminal jurisdiction.

With the arguable exception of major crimes,[21] Indian

Indian jurisdiction in civil matters affecting the rights of the tribe has repeatedly been upheld by the Court. *E.g.*, *United States* v. *Mazurie*, *supra*; *McClanahan* v. *Arizona State Tax Commission*, *supra*; *Kennerly* v. *District Court*, 400 U.S. 423 (1971); *Williams* v. *Lee*, *supra*.

[16] *Fisher* v. *District Court*, 424 U.S. 382, 386-89 (1976); *United States* v. *Quiver*, 241 U.S. 602, 603-05 (1916).

[17] *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 663-64 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

[18] *Iron Crow* v. *Oglala Sioux Tribe*, *supra*, 231 F.2d at 98-99; *Buster* v. *Wright*, 135 F. 947, 950 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599-600 (1906).

[19] *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 151-53 (1973).

[20] *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940).

[21] 18 U.S.C. § 1153.

tribes indisputably have authority to enact and enforce laws governing their own members.[22] It requires no stretching of legal principles to state that similar criminal jurisdiction is necessary over non-Indians present on the Indian reservation—whether they be trespassers, visitors, or residents.[23] To maintain peace on the reservation and stability in tribal relations, an Indian tribe must be able to proscribe offensive conduct on its reservation and to enforce these proscriptions through the powers of arrest, prosecution and punishment. "[T]he power to regulate is only meaningful when combined with the power to enforce." [24]

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[22] The General Crimes Act, 18 U.S.C. § 1152, recognizes this general Indian authority by expressly excepting from federal jurisdiction crimes by Indians against Indians, and crimes by Indians against non-Indians where the Indian offender is punished by the tribe.

[23] *Cf. Morris* v. *Hitchcock*, 194 U.S. 384, 389 (1904) (Indian authority to control intruders on reservation); *Arizona ex rel. Merrill* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970).

[24] *Ortiz-Barraza* v. *United States*, 512 F.2d 1176, 1180 (9th Cir. 1975). *See also* Memorandum from Commissioner of Indian Affairs to Deputy Solicitor, Department of Interior, September 3, 1976, reprinted in 1976 Indian L. Rep. i-8.

A tribal chairman has stated:

> "This question [of tribal jurisdiction] arises with reference to violations of the fish, game and recreation code, traffic and boating offenses, criminal actions, repossessions of personal property, removing property from the reservation, whether it be plants, minerals, gems, rocks or personal property . . . [, d]esecrating or interfering with tribal graveyards, both historic and prehistoric in the non-Indian sense, and the desecration or interference with areas of the reservation having substantial religious significance to the tribe.
>
> "It is our position that every person entering the exterior boundaries of the reservation has consented to the jurisdiction of the tribe, and its courts, and the tribe has the jurisdiction because of its sovereignty to take such action as is necessary to enforce its laws."

Final Report of Task Force Four to American Indian Policy Review Commission (AIPRC) on Federal, State, and Tribal Jurisdiction 99 (Comm. Print 1976) (testimony of Mr. Buck Kitcheyan, Chairman, San Carlos Apache Tribe). For background on the AIPRC, *see* note 38, *infra*.

To say that tribes may control breaches of the peace by binding over offenders to state or federal authorities is not a viable answer. If that is their only criminal power over non-Indians, it casts Indian police and tribal courts in the role of agents and spectators, rather than law enforcers. It subjects Indian authorities to the risk of lawsuits for false arrest if they err in handling offenders, however innocently. And, it results in Indians and non-Indians being subject to different standards of conduct and culpability.

Perhaps most important and problematic, a potential non-Indian offender would be emboldened by the knowledge that the Indian tribe—the party most concerned with the misconduct and generally the only party desirous of doing something about it—would lack the direct means to punish him. In essence, Indian tribes would be at the mercy of distant, normally unconcerned state and federal authorities for law enforcement assistance and effectuation.[25] Under these circumstances,

> "The dignity of the tribal government [would suffer] in the eyes of Indian and non-Indian alike, and a tendency toward lawless behavior [would] necessarily [follow]." [26]

Given this significant relationship between tribal sovereignty and criminal jurisdiction, the Court should recognize the tribe's power to enforce its laws against

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[25] *Oliphant* v. *Schlie*, 544 F.2d at 1013-14; *see also* Final Report of Task Force Four to AIPRC, *supra* note 24, at 37-39.

[26] *Oliphant* v. *Schlie*, 544 F.2d at 1014.

non-Indians as an essential, inherent part of residual Indian sovereignty.

2. The Applicable Federal Treaties and Statutes Do Not Bar the Exercise of Indian Jurisdiction Over Non-Indians.

In recent years, tribal sovereignty has served as a convenient starting point for the Court's analysis of jurisdictional issues—not as a final solution to the problem. Courts have come to rely less on residual or "platonic" notions of sovereignty than on relevant treaties and statutes for resolving questions of tribal jurisdiction. The Court referred to this trend in *McClanahan* v. *Arizona State Tax Commission, supra*:

> "The Indian sovereignty doctrine is relevant . . . not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read." [27]

In analyzing Indian treaties and statutes, certain defined canons of construction must be recalled: (1) Indian treaties and laws are to be liberally construed, with doubts and ambiguities resolved in favor of the Indians; [28] (2) Indian treaties are to be interpreted as the Indians would have understood them; [29] and (3) Indian treaties are not generally grants of rights *to* tribes, but grants of rights *from* Indian tribes.[30]

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[27] 411 U.S. at 172. *Cf.* Powers of Indian Tribes, 55 Interior Dec. 14, 57 (1934):

> "[T]he question of tribal criminal jurisdiction [must be] dealt with . . . by asking, first, what the original sovereign powers of the tribes were, and then, how far and in what respects these powers have been limited." *Id.*

[28] *E.g., Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976).

[29] *E.g., Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 631 (1970).

[30] *E.g., United States* v. *Winans*, 198 U.S. 371, 381 (1905).

The Court of Appeals below started with the proposition that the tribe originally had criminal jurisdiction over non-Indians on the reservation and still possessed it unless it had been terminated by Congress. The court held that jurisdiction had never been terminated.

The court found that the two treaties between the United States and the Suquamish Indians were silent on the tribe's power to try non-Indian criminals,[31] and that three allegedly relevant statutes—18 U.S.C. § 1152 (sometimes called the General Crimes Act), 25 U.S.C. § 1302 (Indian Civil Rights Act), and 25 U.S.C. § 1321 (Public Law 280), as amended—did not operate to deprive Indian tribes of criminal jurisdiction over non-Indians.[32] The court accordingly ruled that original Indian criminal jurisdiction within the reservation had not been extinguished. We comment briefly on the General Crimes Act, 18 U.S.C. § 1152, which petitioners claim preempts tribal jurisdiction over non-Indians, and which seems to be the key statute in this case.

18 U.S.C. § 1152 provides:

> "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.
>
> "This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over

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[31] Treaty of Point Elliott, 12 Stat. 927 (1859); Agreement With Indians Residing on Port Madison Indian Reservation, 33 Stat. 1078 (1905); *see Oliphant* v. *Schlie*, 544 F.2d at 1010.

[32] *Oliphant* v. *Schlie*, 544 F.2d at 1010-12.

such offenses is or may be secured to the Indian tribes respectively."

There is nothing on the face of this statute that ousts tribal criminal jurisdiction over non-Indians. In view of the applicable canons of construction, only an express ouster, or one clearly and necessarily implied, would be effective to achieve that drastic result. Given its natural and proper meaning, the statute merely adds *concurrent* federal jurisdiction to the already extant Indian jurisdiction over offenses committed in Indian country. In view of the de facto lack of any adequate tribal law and order systems on Indian reservations, it was found necessary in the early 1800's to extend federal power onto reservations and to delineate areas of exclusive Indian jurisdiction and concurrent Indian-federal jurisdiction. This interpretation of 18 U.S.C. § 1152 is supported by legislative history and by case law of the period.[33]

The leading case to the contrary, *Ex parte Kenyon*, 14 F.Cas. 353 (C.C.W.D. Ark. 1878) (No. 7720), is not sound authority against Indian jurisdiction. *Kenyon's* actual holding is that an Indian tribe in the Indian Territory lacked criminal jurisdiction over a white man who had married into the tribe, and later when his Indian wife died, moved to Kansas to live and there sold his deceased wife's horse, supposedly a crime. The court held that because the crime, if any, was committed in Kansas, and hence beyond the territorial jurisdiction of the tribal court, the tribal court lacked subject matter jurisdiction.[34] The federal court added, as an independent second reason for the tribal court's lack of jurisdiction, that at the time of the crime, the defendant had abandoned his Indian ties. For this holding the court gave

[33] H.R. Rep. No. 474, 23d Cong., 1st Sess. 13, 36-37, 98 (1834); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[34] *Contra, Settler* v. *Lameer*, 507 F.2d 231 (9th Cir. 1974), holding that the Yakima tribal court had jurisdiction to punish members who violated tribal fishing laws outside the reservation.

no rationale, but merely cited R.S. § 2146, on the bare, uncritical assumption that a tribal court has jurisdiction only over Indians. Without an explanation of what (and whether) the court thought about the concurrent jurisdiction argument and about the canons of construction, which it apparently ignored, the case can have little or no weight for the proposition that there is no concurrent jurisdiction.

In contrast, Oliphant's and Belgarde's offenses here were committed upon the reservation, and breached the peace and welfare of the tribe governing the reservation.

There are good legal, moral and practical reasons why 18 U.S.C. § 1152 should be ruled concurrent, with the tribal authorities therefore able to prosecute and punish these non-Indian offenders. On its face, 18 U.S.C. § 1152 shows that Congress assumed that at lease *some* criminal jurisdiction is concurrent; that is, Congress must have assumed that where an Indian commits a crime against a white person, both tribal and federal courts would have jurisdiction. This is clear because § 1152 cancels the federal jurisdiction where the Indian "has been punished by the local law of the tribe." Obviously, Congress would not have canceled jurisdiction that it thought did not exist in the first place.

We will grant that Congress also apparently assumed that tribes would not have jurisdiction over white criminals. Otherwise, it undoubtedly would have given the non-Indian wrongdoer the same double jeopardy protection as the Indian wrongdoer. But this was a mistaken *assumption* by Congress, and not a substitute for language expressly ousting preexisting tribal jurisdiction, an ouster which could not take place without such language.

When Congress enacted the General Crimes Act, 18 U.S.C. § 1152, it was not its purpose to displace one

criminal justice system with another. Had that been its purpose, there surely would have been some evidence of it. Essentially, the statute was designed to fill a vacuum. Whether Congress *would* have terminated tribal jurisdiction over non-Indians, if someone raised the issue, will never be known. That would have been easy to do, if Congress intended to do it. But apparently the issue was not raised, and Congress was silent on the point. Surely such silence should not be construed to oust the jurisdiction which tribes require, and are able to assert, to maintain the peace and welfare of reservation communities.

3. Tribal Courts Are Capable of Fair and Efficient Justice.

An underlying assumption of petitioners' claims is that they cannot obtain justice within the Indian tribal court system. For example, they assert that, as non-Indians, they had no voice in enacting the tribal ordinances under which they were arrested; that non-Indians would be excluded from the jury panels; and that due process and judicial competence are lacking in the tribal court system. We respond that petitioners' rights are adequately protected by the Indian Civil Rights Act of 1968, which incorporates most of the Bill of Rights into Indian judicial proceedings.

As previously indicated, the Indian Civil Rights Act provides protections to parties in tribal court proceedings commensurate with constitutional standards. The Act sets out prohibitions against illegal searches and seizures; against placing defendants in double jeopardy; against self-incrimination; against denial of a speedy, fair, and public trial, including the right of confrontation and assistance of counsel; against excessive bail and cruel and unusual punishment; against denial of equal protection and deprivation of due process; and against denial of trial by jury, consisting of not less

than six persons. 25 U.S.C. §§ 1302(2), (3), (4), (6), (7), (8), (10). Furthermore, criminal penalties are limited to six months imprisonment and/or $500 fine, effectively restricting tribal courts' power to minor sanctions.

In short, basic Anglo-American values are to be applied, with few exceptions, such as the right to free counsel—and those exceptions only to accommodate practical and cultural tribal needs.[35]

A second factor serving to undercut petitioners' objections is the improving quality of tribal courts and Indian justice. Modern tribal courts (of which today there are around 128) have their origin in the Courts of Indian Offenses, created originally in the late 1800's by the Bureau of Indian Affairs and formalized under the Indian Reorganization Act of 1934.[36] While Indian tribal courts vary greatly in jurisdiction, operation, and quality, it may accurately be said that, "Indian tribal courts throughout the United States are in a dynamic

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[35] These exceptions, in view of the limitation of tribal courts to minor sanctions, pose no constitutional problems. This Court has previously recognized differences between constitutional and procedural requirements for federal and state courts. *E.g.*, *Apodaca* v. *Oregon*, 406 U.S. 404 (1972) (unanimity requirement for juries); *Williams* v. *Florida*, 399 U.S. 78 (1970) (12-man federal jury versus six-man state jury). The Court has also qualified the right to jury trial for petty crimes or offenses. *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). *Cf. King* v. *Morton*, 520 F.2d 1140 (D.C. Cir. 1975) (applicability of trial by jury in territory of Samoa).

Here, of course, it is premature for petitioners to contend that their rights to a fair trial and to due process will be violated. The Suquamish Indian Tribe may include non-Indians in the venire. The objection on grounds of non-participation in the drafting of the tribal code has already been rejected by this Court. *United States* v. *Mazurie*, *supra*, 419 U.S. at 557-58.

[36] *See generally Colliflower* v. *Garland*, 342 F.2d 369, 372-74 (9th Cir. 1965) (history of Indian tribal courts); *Iron Crow* v. *Oglala Sioux Tribe*, 231 F.2d 89, 94-98 (8th Cir. 1956) (same); American Indian Lawyer Training Program, *Indian Self-Determination and the Role of Tribal Courts* 13-35 (1977); W. Hagan, *Indian Police and Judges* (1966).

stage of growth, both in numbers and importance." [37]

There is not a great deal of current or comprehensive information on modern tribal courts and criminal justice systems. An excellent summary statement is contained in the Final Report of the American Indian Policy Review Commission:[38]

> "In addition to preexisting tribal systems and 25 CFR systems, many tribal governments have created justice systems in the context of their inherent sovereignty, and under the auspices of the Indian Reorganization Act. In 1976, there were 117 operative tribal courts in Indian country; this represents an increase of 32 courts since 1973 when there were 85. In 1973, Indian tribal courts handled approximately 70,000 cases; although this caseload has increased, no actual current figures are available. . . .
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> "The 117 Indian justice systems vary considerably from one another in both design and effectiveness. Like their non-Indian counterparts, Indian court

[37] Collins, Johnson, and Perkins, *American Indian Courts and Tribal Self-Government*, 63 A.B.A.J. 808, 811 (1977); *see also* Brakel, *American Indian Tribal Courts: Separate? "Yes," Equal? "Probably Not"*, 62 A.B.A.J. 1002 (1976).

[38] American Indian Policy Review Commission, Final Report, vol. 1, at 167-68 (Comm. Print 1977).

The American Indian Policy Review Commission was established by Public Law No. 93-580, 88 Stat. 1910 (1975), "to conduct a comprehensive review of the historical and legal developments underlying the Indians' unique relationship with the Federal Government in order to determine the nature and scope of necessary revisions in the formulation of policies and programs for the benefit of Indians." 25 U.S.C. § 174 note. The Commission was composed of 11 members—three members from the Senate, three members from the House of Representatives, three members from recognized Indian tribes, one member from a non-recognized Indian group, and one member to represent urban Indians. Eleven task forces were set up to investigate areas ranging from tribal government to Indian health and education to problems affecting urban Indians. The Commission's Final Report was submitted to Congress on May 17, 1977, culminating two years of research, hearings, and investigation.

judges are both appointed and elected. There is no uniform standard, but as a general rule, most tribal judges are not attorneys. At least one tribe requires applicants for judicial positions to pass an oral and written test on the tribe's constitution and laws. Indian tribal courts function in both criminal and civil matters. In some areas, both the judicial and police functions are contracted from neighboring non-Indian communities. In at least one area, a non-Indian government contracts law enforcement services from a tribal police department. Some tribes provide extensive representation for indigent persons in tribal court; others provide none. Police services may be provided entirely by tribal police, by BIA officers or by a combination of BIA and tribal police. Tribal appellate systems also vary greatly. On some reservations, there is no appellate court system. Where tribes utilize 25 CFR Courts of Indian Offenses, appeals follow through the Department of the Interior. Some tribes have their own appellate court system; others use judges from neighboring tribes for special appeals. The tribal council may also constitute itself as the final tribal appellate system.

> "Any generalization about tribal courts and law enforcement systems is therefore vague by definition. These are evolving institutions responding to tribal and community needs and operating at various levels of sophistication. Contrary to the views of some, there does not appear to be anything inherent in tribal justice systems that makes them any less capable than their non-Indian counterparts in dispensing justice." [39]

[39] *See also* Final Report of Task Force Two to AIPRC on Tribal Government 255-56, 271-83 (Comm. Print 1976); Clinton, *Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 Ariz. L. Rev. 503, 553-64 (1976).

According to 1977 figures from the Department of Interior, there are presently 71 tribal courts, 32 "CFR" courts (*i.e.*, Courts of

This description reflects the variety, evolution, and capacity of Indian tribal courts. No doubt not all tribal courts are models of jurisprudence, but neither are all state and federal courts. Improvements are occurring rapidly and on a broad front. They include: (1) increased federal and tribal funding for training judicial and legal personnel and for improving court facilities; (2) establishment (in 1970) of the National American Indian Court Judges Association to organize ongoing judicial education programs;[40] (3) revision of tribal constitutions, codes and bylaws;[41] (4) approval by several Public Law 280 states of retrocession back to tribes; and (5) federal and state court decisions recognizing and expanding Indian jurisdiction.[42]

Indian Offenses), and approximately 25 traditional courts. The difference between tribal courts and "CFR" courts is that tribal courts are funded by and an organic part of the tribe rather than the Bureau of Indian Affairs.

A recent survey by the American Indian Lawyer Training Program describes in some detail the organization and operation of 98 tribal court systems. *See Indian Self-Determination and the Role of Tribal Courts, supra* note 36, at Appendix D. Of 85 tribes responding to a question on Indian jurisdiction, 31 tribes indicated that they presently exercised criminal jurisdiction over non-Indians. Thirty-nine tribes stated that they did not but were adopting or considering necessary changes (*e.g.*, amendment of tribal constitution or code) to permit assertion of such jurisdiction. Thirteen tribes said that they had no desire to exercise civil or criminal jurisdiction over non-Indians. *Id.* at Appendix C-11, C-12 (questions 52 and 55).

[40] *See generally* National American Indian Court Judges Association, Inc., Justice and the American Indian (1974) (five-volume work on Indian judiciary and Public Law 280, separation of powers, extradition procedures, basis of tribal law and order authority, and federal jurisdiction over major crimes).

[41] *E.g.*, Pet. App. B 6-8, 39 *et seq.* (Suquamish Constitution and code); *O'Neal* v. *Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1143-44 (8th Cir. 1973). *See* 25 U.S.C. § 1311; 25 C.F.R. Pt. 11.

[42] *Cf. Wakefield* v. *Little Light*, 276 Md. 333, 347 A.2d 228 (1975) (tribal proceedings accorded full faith and credit); *Jim* v. *CIT Financial Services Corp.*, 87 N.M. 362, 533 P.2d 751 (1975) (same).

The rise of the Indian tribal court has paralleled the recent movement away from dispersal and assimilation of Indians, a trend that has waxed and waned over 200 years of American history. Stronger, more competent, and more respected tribal courts are an important part of Indian identity and self-determination. They are a renewed force in reservation life, significant for both Indians and non-Indians.

CONCLUSION

For the reasons stated, we respectfully urge the Court to affirm the decisions below, as requested by respondents.

Respectfully submitted,

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October 28, 1977

As indicated, *supra* note 39, not all tribes wish or are able to exercise criminal jurisdiction over non-Indians. In some instances, there are treaty or tribal code prohibitions against such jurisdiction. *E.g.*, *Quechan Tribe of Indians* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976) (code's limitation of jurisdiction to members of tribe); Treaty with the Willamette Indians, 10 Stat. 1143, 1145 (1855); F. Cohen, *Handbook of Federal Indian Law* 364 (1972 Reprint). In other cases, practical realities may result in a policy of abstention, such as the tribe's size, location, economic ability, and relationship with non-Indians. *See* Final Report of Task Force Four to AIPRC, *supra* note 24 at 89.